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# Don't Rock the Boat: Minnesota's Canon 5 Keeps Incumbents High and Dry While Voters Flounder in a Sea of Ignorance

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## DON'T ROCK THE BOAT: MINNESOTA'S CANON 5 KEEPS INCUMBENTS HIGH AND DRY WHILE VOTERS FLOUNDER IN A SEA OF IGNORANCE

Plymouth Nelson<sup>†</sup>

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“Censorship always defeats its own purpose, for it creates in the  
end the kind of society that is incapable of exercising real  
discretion.”

— Henry Steele Commager, Historian

### I. INTRODUCTION

The voting public justifiably takes for granted the ability to freely gather information about election candidates. After all, voters are flooded with information concerning candidates from all sources, and have a plentiful supply of resources to research if they feel they need more. This is certainly the case with elections regarding the legislative and executive branches, but should it be any different when the candidates are judges to the highest courts in the state? The Eighth Circuit Court of Appeals recently reviewed a Free Speech/Equal Protection case in which the plaintiff was a judicial candidate for the Supreme Court of Minnesota and the defendant was the Minnesota Board of Judicial Standards.<sup>1</sup> In *Republican Party of Minnesota v. Kelly*,<sup>2</sup> Greg Wersal, a Minneapolis

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<sup>†</sup> Duke University, B.S. Mechanical Engineering 1994; William Mitchell College of Law, J.D. anticipated May 2003.

1. *Republican Party of Minnesota v. Kelly*, 247 F.3d 854, 854 (8th Cir. 2001).

2. *Id.*

attorney running for the Minnesota Supreme Court, encountered the provisions of Canon 5 of Minnesota's Code of Judicial Conduct. The court considered whether that canon violated the free speech and association guarantees inherent in the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.<sup>3</sup> The court, inconsistently with a prior appellate decision,<sup>4</sup> erroneously ruled that such provisions do not violate the United States Constitution.<sup>5</sup>

This article first examines the facts of *Kelly*.<sup>6</sup> It then explores the history leading up to the American Bar Association's current Model Code of Judicial Conduct, with a further look at the history of Minnesota's judicial code.<sup>7</sup> Next, the piece analyzes and comments on the Eighth Circuit Court's decision.<sup>8</sup> Finally, the article concludes that the court has ruled not only inconsistently with prior appellate rulings, but also unfairly with regard to the rights of judicial candidates, and more importantly, the rights of the electorate.<sup>9</sup>

## II. THE FACTS

In 1996, Greg Wersal, a Minneapolis attorney and member of the Republican Party of Minnesota, campaigned for the office of Associate Justice of the Minnesota Supreme Court.<sup>10</sup> The same year, the Minnesota Supreme Court revised the Minnesota Code of Judicial Conduct, reorganizing the individual canons to bring the code essentially in line with the 1990 version of the ABA Model Code of Judicial Conduct.<sup>11</sup> Of the revisions the Minnesota Supreme Court made in revised Canon 5,<sup>12</sup> one was to allow

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3. *Id.* at 860.

4. *See Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224, 231 (7th Cir. 1993).

5. *Kelly*, 247 F.3d at 885.

6. *See infra*, Part II.

7. *See infra*, Part III.

8. *See infra*, Part IV.

9. *See infra*, Part V.

10. *Kelly*, 247 F.3d at 857.

11. *Id.* at 857-58.

12. The text of Canon 5, *A Judge or Judicial Candidate Shall Refrain from Political Activity Inappropriate to Judicial Office*, is as follows:

A. In General.

Each justice of the supreme court and each court of appeals and district court judge is deemed to hold a separate nonpartisan office. MINN STAT § 204B.06 Subd 6.

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(1) Except as authorized in Section 5B(1), a judge or a candidate for election to judicial office shall not:

(a) act as a leader or hold any office in a political organization; identify themselves as members of a political organization, except as necessary to vote in an election.

(b) publicly endorse or, except for the judge or candidate's opponent, publicly oppose another candidate for public office;

(c) make speeches on behalf of a political organization;

(d) attend political gatherings; or seek, accept or use endorsements from a political organization; or

(e) solicit funds for or pay an assessment to or make a contribution to a political organization or candidate, or purchase tickets for political party dinners or other functions.

(2) A judge shall resign the judicial office on becoming a candidate either in a primary or in a general election for a non-judicial office, except that a judge may continue to hold judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention, if the judge is otherwise permitted by law to do so.

(3) A candidate for a judicial office, including an incumbent judge:

(a) shall maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary, and shall encourage family members to adhere to the same standards of political conduct in support of the candidate as apply to the candidate;

(b) shall prohibit employees who serve at the pleasure of the candidate, and shall discourage other employees and officials subject to the candidate's direction and control from doing on the candidate's behalf what the candidate is prohibited from doing under the Sections of this Canon;

(c) except to the extent permitted by Section 5B(2), shall not authorize or knowingly permit any other person to do for the candidate what the candidate is prohibited from doing under the Sections of this Canon;

(d) shall not:

(i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his or her views on disputed legal or political issues; or misrepresent his or her identity, qualifications, present position or other fact, or those of the opponent; and

(ii) by words or conduct manifest bias or prejudice inappropriate to judicial office.

(e) may respond to statements made during a campaign for judicial office within the limitations of Section 5A(3)(d).

B. Judges and Candidates For Public Election.

(1) A judge or a candidate for election to judicial office may, except as prohibited by law,

(a) speak at gatherings, other than political organization gatherings, on his or her own behalf;

(b) appear in newspaper, television and other media advertisements supporting his or her candidacy; and

(c) distribute pamphlets and other promotional campaign literature supporting his or her candidacy.

(2) A candidate shall not personally solicit or accept campaign contributions or solicit publicly stated support. A candidate may,

“candidates and judges to speak on their own behalf to gatherings generally, while another prohibited candidates and incumbents from attending political events.”<sup>13</sup> Wersal and his wife, Cheryl, spoke at Republican Party gatherings during Wersal’s 1996 campaign, announcing Wersal’s membership in the Republican Party and his support for a strict constructionist view of the Constitution.<sup>14</sup> Through distribution of campaign literature, they also criticized several Minnesota Supreme Court decisions concerning crime, welfare, and abortion.<sup>15</sup> In May, a delegate to the Republican district convention filed an ethics complaint against Wersal with the Office of Lawyers Professional Responsibility.<sup>16</sup> The complaint questioned, among other things, Wersal’s presence at Republican gatherings and the distribution of campaign literature

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however, establish committees to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may solicit and accept campaign contributions, manage the expenditure of funds for the candidate’s campaign and obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting and accepting campaign contributions and public support from lawyers, but shall not seek, accept or use political organization endorsements. Such committees shall not disclose to the candidate the identity of campaign contributors nor shall the committee disclose to the candidate the identity of those who were solicited for contribution or stated public support and refused such solicitation. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

C. Incumbent Judges. A judge shall not engage in any political activity except (1) as authorized under any other Section of this Code, (2) on behalf of measures to improve the law, the legal system or the administration of justice, or (3) as expressly authorized by law.

D. Political Organization. For purposes of Canon 5 the term political organization denotes a political party organization.

E. Applicability. Canon 1, Canon 2(A), and Canon 5 generally applies to all incumbent judges and judicial candidates. A successful candidate, whether or not an incumbent, is subject to judicial discipline for his or her campaign conduct; an unsuccessful candidate who is a lawyer is subject to lawyer discipline for his or her campaign conduct. A lawyer who is a candidate for judicial office is subject to Rule 8.2 of the Minnesota Rules of Professional Conduct.

MINNESOTA CODE OF JUDICIAL CONDUCT Canon 5 (2000).

13. *Kelly*, 247 F.3d at 858.

14. *Id.*

15. *Id.*

16. *Id.* The Office of Lawyers Professional Responsibility investigates and prosecutes ethical violations of attorney candidates for judicial office under the direction of the Minnesota Lawyers Professional Responsibility Board.

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critical of Minnesota Supreme Court decisions.<sup>17</sup> The Director of the Minnesota Lawyers Professional Responsibility Board dismissed the complaint, finding no disciplinary action was necessary under Canon 5 of the Code of Judicial Conduct.<sup>18</sup> The Director's written determination noted several things. First, it was not clear whether the Minnesota Supreme Court's 1996 revision of the Code retained the ban on candidates speaking to political gatherings.<sup>19</sup> Second, the Director also questioned whether the "announce clause"<sup>20</sup> was even applicable to Wersal's statements, or regardless of applicability, whether it was enforceable, considering numerous decisions from other jurisdictions striking down or narrowly interpreting similar language.<sup>21</sup> After receiving this notification, Wersal withdrew his candidacy for the 1996 race.<sup>22</sup> In January of the following year, he announced his candidacy for an upcoming 1998 supreme court vacancy.<sup>23</sup> The Minnesota Board on Judicial Standards, in charge of enforcing ethical codes against judges and aware of Wersal's solicitation of the Republican Party endorsement, petitioned the Minnesota Supreme Court in September of 1997 to amend Canon 5.<sup>24</sup> The Board wanted to add language limiting the ability of candidates to "identify themselves as members of a political organization" as well as clarifying that "judicial candidates could not speak to political gatherings."<sup>25</sup> The supreme court adopted these recommendations and ordered an amendment of

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17. *Id.* The complaint also inquired into the solicitation of partisan support by the campaign committee. *Id.*

18. *Id.*

19. *Id.* at 858-859.

20. *Id.* at 859. What is commonly referred to as the "announce clause" is the phrase in Canon 5(A)(3)(d)(ii) which states "a candidate for judicial office shall not . . . announce his or her views on disputed legal or political issues." MINNESOTA CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(ii) (2000).

21. *Kelly*, 247 F.3d at 859.

22. *Id.*

23. *Id.* In 1998, Greg Wersal and Roger Peterson filed for the seat held by justice Alan Page. Page and Peterson advanced to the general election. Minnesota State Bar Association, *1998-99 Annual Reports*, at <http://www2.mnbar.org/reports/99annual.htm> (last visited Oct. 16, 2001). Wersal also ran against Minnesota Supreme Court justice James Gilbert in 2000, but lost 69% to 31%. Office of the Minnesota Secretary of State, 2000 – Minnesota General Election, Judicial Results (2000), at [http://elections.sos.state.mn.us/ENR2000\\_General/ElecRslts.asp?M=J&P=A](http://elections.sos.state.mn.us/ENR2000_General/ElecRslts.asp?M=J&P=A) (last modified Dec. 12, 2000).

24. *Kelly*, 247 F.3d at 859.

25. *Id.*

Canon 5, effective January 1, 1998.<sup>26</sup>

In February 1998, Wersal sought an advisory opinion from the Lawyers Board concerning whether he might be prosecuted for ethical violations for speaking at a political party gathering or obtaining a Republican Party endorsement, and also whether the Board would enforce the Canon 5 provision that restricted candidates from announcing their views on disputed legal or political issues.<sup>27</sup> As for speaking at political party gatherings and obtaining the Republican Party endorsement, the Director of the Board stated that the Board would indeed subject Wersal to discipline.<sup>28</sup> However, because Wersal had not provided the Board with specific statements he might make regarding his views on disputed issues, the Board could not specifically advise him, adding that, “the Board continued to have ‘significant doubts as to whether or not [the announce clause] would survive a facial challenge to its constitutionality’ and that it would not enforce the provision unless the speech at issue violated other portions of the judicial ethics code.”<sup>29</sup>

Shortly after receiving this advisory opinion, Wersal filed a complaint<sup>30</sup> seeking “declaratory and injunctive relief from the provisions of Canon 5.”<sup>31</sup> The complaint asserted that Canon 5 violated the First Amendment’s free speech and association guarantees and the Fourteenth Amendment’s Equal Protection Clause.<sup>32</sup> Wersal moved for a “temporary restraining order and/or preliminary injunction to enjoin the Lawyers Board and Judicial Board from enforcing Canon 5” so Wersal could participate in Republican caucuses coming up in March 1998.<sup>33</sup> The district court denied that motion<sup>34</sup> and the Court of Appeals for the Eighth

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. The initial complaint was filed under 42 U.S.C. § 1983. *Id.* Other plaintiffs who file suit involving the issue of First Amendment free speech and association and Fourteenth Amendment Equal Protection in the context of relief from the provisions of judicial codes have likewise file under section 1983. *See* *Butler v. Alabama Judicial Inquiry Comm’n*, 111 F. Supp. 2d 1224, 1228 (M.D.Ala. 2000); *Suster v. Marshall*, 951 F. Supp. 693, 696 (N.D. Ohio 1996); *Stretton v. Disciplinary Bd. of Supreme Court of Pennsylvania*, 763 F. Supp. 128, 129 (E.D. Pa. 1991), *vacated in part* by 944 F.2d 137 (3d Cir. 1991).

31. *Kelly*, 247 F.3d at 859.

32. *Id.* at 860.

33. *Id.*

34. *Republican Party of Minnesota v. Kelly*, 996 F. Supp. 875, 880 (D.Minn.

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Circuit subsequently affirmed that decision.<sup>35</sup> While awaiting the appeal to the Eighth Circuit, Wersal canceled numerous speeches scheduled at various Republican events and declined answering specific questions asked of him by the press and public for fear that answering might unveil his views on disputed legal or political issues.<sup>36</sup>

Pertaining to the prohibition of a candidate's attending or speaking at political gatherings, the district court found for the defendants,<sup>37</sup> concluding Minnesota had a "compelling interest in maintaining the actual and apparent integrity and independence of its judiciary"<sup>38</sup> and that the bans on candidates' political activity and fund solicitation were narrowly tailored to serve those interests because "[a]lternative means exist through which voters may obtain information concerning judicial candidates."<sup>39</sup> Concerning the announce clause, the district court cited other jurisdictions that found that "the state has a compelling interest in limiting the First Amendment rights of judicial candidates in order to maintain the actual and apparent impartiality and independence of the judiciary."<sup>40</sup> The critical issue again for the court was whether that provision was "narrowly tailored to serve the State's interest in maintaining the integrity and independence of the judiciary" and interpreted the clause to reach only the candidate's discussion of issues "*likely to come before the court.*"<sup>41</sup> The court likewise found the announce clause did not unnecessarily restrict protected speech.<sup>42</sup>

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1998).

35. Republican Party of Minnesota v. Kelly, No. 98-1625, 1998 WL 764782, at \*1 (8th Cir. Nov. 2, 1998).

36. *Kelly*, 247 F.3d at 860.

37. Republican Party of Minnesota v. Kelly, 63 F. Supp. 2d 967, 986 (D. Minn. 1999). The primary defendant was Verna Kelly, Chairperson of the Minnesota Board of Judicial Standards. *Id.*

38. *Id.* at 980.

39. *Id.* Presumably, Judge Davis is referring to Canon 5(B)(1)(c), in which candidates may "distribute pamphlets and other promotional campaign literature supporting his or her candidacy." MINNESOTA CODE OF JUDICIAL CONDUCT Canon 5(B)(1)(c) (2000).

40. *Kelly*, 63 F. Supp. 2d at 984.

41. *Id.* at 986 (emphasis added).

42. *Id.*



### III. HISTORY

#### A. American Bar Association

The American Bar Association first devised ethical guidelines for judges in 1924, with thirty-six “Canons of Judicial Ethics” drafted by a committee headed by Chief Justice William Howard Taft.<sup>43</sup>

In terms of speech, Canon 28 provided that candidates “should avoid making political speeches.”<sup>44</sup> Judges were to avoid giving speeches that advanced the cause of a particular party, but were free to speak about current political issues as long as no obvious party connection was evident.<sup>45</sup> Similarly, Canon 30 provided that a candidate for judicial office “should not announce in advance his conclusions of law on disputed issues to secure class support.”<sup>46</sup> While these canons were not intended to be a basis for disciplinary action, the ABA replaced the original canons with a new Model Code of Judicial Conduct in 1972 that was designed to be enforceable.<sup>47</sup> However, the range of acceptable political talk was greatly curtailed by the introduction of wording in the new Canon 7 that candidates could not announce their views on “disputed political issues.”<sup>48</sup> Restrictions on discussion of legal issues were also imposed, with judicial candidates prohibited from announcing their views on “disputed legal issues.”<sup>49</sup> The Special

43. THEODORE J. BOUTROS, JR. ET AL., STATE JUDICIARIES AND IMPARTIALITY: JUDGING THE JUDGES 121 (Roger Clegg & James. D. Miller eds., 1996).

44. PATRICK M. MCFADDEN, ELECTING JUSTICE: THE LAW AND ETHICS OF JUDICIAL ELECTION CAMPAIGNS 86 (1990); Canon 28 also required judges to avoid “making or soliciting payments of assessments or contributions to party funds, the public endorsement of candidates for political office and participation in party conventions.” ABA CANONS OF JUDICIAL ETHICS Canon 28 (1924). After a 1933 amendment, Canon 28 prohibited judges from “generally engaging in partisan activities and, more specifically, from serving as a party committee member or party leader.” LISA L. MILORD, THE DEVELOPMENT OF THE ABA JUDICIAL CODE 45 (1992).

45. ABA CANONS OF JUDICIAL ETHICS Canon 30 (1924).

46. MCFADDEN, *supra* note 44, at 86. Further, a candidate for judicial position “should do nothing while a candidate to create the impression that if chosen, he will administer his office with bias, partiality or improper discrimination.” ABA CANONS OF JUDICIAL ETHICS Canon 30 (1924).

47. BOUTROS, *supra* note 43, 121.

48. MCFADDEN, *supra* note 44, at 86. This provision is within Canon 7B(1)(c) of the 1972 Code. See ABA CODE OF JUDICIAL CONDUCT Canon 7B(1)(c) (1972).

49. MCFADDEN, *supra* note 44, at 86.

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Committee on Standards of Judicial Conduct felt a judicial candidate could not run a campaign based on a platform of partiality for specific groups, nor could he commit himself in advance of a judicial ruling on disputed legal issues, nor misrepresent himself.<sup>50</sup> The Committee further believed that candidates should not base campaigns on their views of disputed political issues but should instead focus on their ability, experience and record.<sup>51</sup>

The ABA Standing Committee on Ethics and Professional Responsibility began to revise the 1972 Code in 1986.<sup>52</sup> The decision to revise Canon 7 of the 1972 Code stemmed from the failure to provide sufficient guidance concerning the political conduct of judges and candidates, principally because of the various selection methods for judges throughout the jurisdictions.<sup>53</sup> What emerged from the Committee was a new Canon 5, addressing four areas pertinent to both judicial candidates and sitting judges. Canon 5A addressed issues common to the political conduct of judges and judicial candidates regardless of method of judicial selection, Canon 5B focused on issues unique to candidates subject to appointment, Canon 5C to issues exclusive to sitting judges and candidates subject to public elections, and finally Canon 5D dealt with issues relating to the political activity of incumbent judges.<sup>54</sup> In August 1990 the ABA House of Delegates adopted these revisions, including the addition of a preamble explaining the function of the code.<sup>55</sup>

As discussed above, Canon 5 of the 1990 Model code of Judicial Conduct has four sections, of which section 5A concerns rules related to free speech. Section 5A(3)(d) makes significant

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50. E.WAYNE THODE, REPORTER'S NOTES TO CODE OF JUDICIAL CONDUCT 98 (1973).

51. *Id.*

52. BOUTROS, *supra* note 43, at 121.

53. MILORD, *supra* note 44, at 46-7. Methods cited include merit selection, nonpartisan and partisan elections, executive or legislative appointments, and court selection. *Id.*

54. MILORD, *supra* note 44, at 47. The Committee first attempted to draft a Canon with three alternative sets of rules for the merit system, public elections, and appointment of judges, however the Committee found this version too repetitive. It then attempted a unified rule but was severely criticized for not addressing issues unique to specific methods of judicial selection, including concerns related to political speech in public elections. The final draft was a hybrid of those earlier efforts. *Id.*

55. BOUTROS, *supra* note 43, at 122.

modifications from Canon 7 of the 1972 Code. The prohibition against a candidate announcing his or her views on disputed legal or political issues was replaced with language that a candidate shall not “make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.”<sup>56</sup> The Committee thought this wording would be more amenable to constitutional guarantees of free speech, while still “preventing the harm that can come from statements damaging the appearance of judicial integrity and impartiality.”<sup>57</sup> The Committee also believed the language in the 1972 Code could not “be practically applied in its literal terms.”<sup>58</sup>

In terms of political gatherings, the original Canon 28 of the 1924 Canons of Judicial Ethics stated that “[the judge] should avoid making political speeches, making or soliciting payment assessments or contributions to party funds, the public endorsement of candidates for political office and participation in party conventions.”<sup>59</sup> The 1933 amendment added a second paragraph to the effect that judges should not engage in partisan activities.<sup>60</sup> In 1950, the ABA added a final sentence to Canon 28:

Where however, it is necessary for judges to be nominated and elected as candidates of a political party, nothing herein contained shall prevent the judge from attending or speaking at political gatherings, or from making contributions to the campaign funds of the party that has nominated him and seeks his election or re-election.<sup>61</sup>

The 1972 revisions affirmed that thinking:

A judge holding an office filled by public election . . . or a candidate for such office, may, only insofar as permitted by law, attend political gatherings, speak to such gatherings on his own behalf when he is a candidate for election or re-election, identify himself as a member of a political party, and contribute to a political party or organization.<sup>62</sup>

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56. ABA MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d) (1990).

57. MILORD, *supra* note 44, at 50.

58. *Id.*

59. ABA CANONS OF JUDICIAL ETHICS Canon 28 (1924).

60. MILORD, *supra* note 44, at 140. Specifically, “[h]e should neither accept nor retain a place on a party committee nor act as a party leader, nor engage generally in partisan activities.” *Id.*

61. ABA CANONS OF JUDICIAL ETHICS AMENDMENT TO Canon 28 (1950).

62. ABA CODE OF JUDICIAL CONDUCT Canon 7A(2) (1972).

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Of course, the “law” referenced above is established by either statutory or common law of the jurisdiction of the particular candidate since there is nothing within the Code itself suggesting those parameters.<sup>63</sup>

Section 5C(1) of the 1990 Model Code of Judicial Conduct revised the 1972 Code, applying those provisions to judges and judicial candidates in all types of judicial elections (partisan, nonpartisan, and retention).<sup>64</sup>

### B. Minnesota

The methods of judicial selection in each jurisdiction are varied<sup>65</sup> and the canons or codes of judicial ethics of these states

63. THODE, *supra* note 50, at 96-7.

64. MILORD, *supra* note 44, at 52.

65. For each state's supreme court provisions, see LYLE WARRICK, JUDICIAL SELECTION IN THE UNITED STATES: A COMPENDIUM OF PROVISIONS (2nd ed. 1993). Alabama: judicial selection and retention through partisan elections; Alaska: selects judges through appointment by the governor, retention by nonpartisan election; Arizona: selection through appointment, retention through nonpartisan election; Arkansas: Both initial selection and retention are through nonpartisan elections (updated information from American Judicature Society, *Judicial Selection Methods in the States*, at <http://www.ajs.org/select11.html> (last visited Jan. 31, 2002)); California: initial appointment by governor, retained at the next general election after appointment by nonpartisan ballot, running unopposed; Colorado: initial appointment by governor, retention upon proper filing of declaration and majority vote at general election; Connecticut: nominated by the governor and appointed by the general assembly; retention is by nomination for reappointment and incumbent judges seeking reappointment to the same court are presumed qualified with the burden of rebutting that presumption on the judicial selection commission; Delaware: initial selection and retention through gubernatorial appointment; District of Columbia: initial selection through nomination by the President and consent by the Senate; retention through a filed declaration of candidacy and review by the Tenure Commission; Florida: initial appointment by the governor with a nonpartisan retention vote; Georgia: initial selection and retention by nonpartisan election; Hawaii: initial selection by appointment of the governor with retention through petition to the Judicial Selection Commission; Idaho: initial selection and retention by nonpartisan election; Illinois: Initial selection at general or judicial elections by partisan ballot, retention through declaration of candidacy and nonpartisan election; Indiana: initial selection by governor appointment, retention by general election; Iowa: initial selection by governor appointment with a retention ballot at the next judicial election; Kansas: initial selection through nonpartisan appointment by the governor, retention by election on a nonpartisan ballot; Kentucky: initial selection and retention by nonpartisan election; Louisiana: initial selection and retention through partisan elections; Maine: initial selection and retention through gubernatorial appointment subject to review by the Joint Standing Committee on the Judiciary; Maryland: initial selection through appointment by the governor with an uncontested retention election; Massachusetts: initial selection through

nomination and appointment by the governor, retention not applicable due to the nature of the judges' terms; Michigan: initial selection and retention through partisan elections (updated information from American Judicature Society, *Judicial Selection Methods in the States*, at <http://www.ajs.org/select11.html> (last visited Jan. 31, 2002)). While party affiliations are not listed on the ballots candidates usually run with party endorsements. *Id.*; Minnesota: initial selection and retention using nonpartisan elections; Mississippi: initial selection and retention through partisan elections; Missouri: initial selection through appointment by the governor, retention through separate nonpartisan judicial ballot; Montana: initial selection by nonpartisan election, retention through reelection either against an opponent or solely on the question of retention or rejection; Nebraska: initial selection by the governor, retention through nonpartisan uncontested ballot; Nevada: initial selection and retention through nonpartisan election; New Hampshire: initial selection through nomination, with all judicial officers serving during good behavior until mandatory retirement at seventy; New Jersey: initial selection through appointment by the governor, retention through reappointment; New Mexico: initial selection through appointment by the governor, first retention election on a partisan ballot, subsequent retention elections by nonpartisan ballot; New York: initial selection and retention through appointment by the governor; North Carolina: initial selection and retention through partisan elections; North Dakota: initial selection and retention through nonpartisan elections; Ohio: initial selection and retention through partisan elections (updated information from American Judicature Society, *Judicial Selection Methods in the States*, at <http://www.ajs.org/select11.html> (last visited Jan. 31, 2002)). As in Michigan, party affiliation is not listed on the ballot. *Id.*; Oklahoma: initial selection by appointment, retention through a uncontested nonpartisan ballot; Oregon: initial selection and retention through nonpartisan elections; Pennsylvania: initial selection by partisan election, retention through nonpartisan election; Rhode Island: initial selection by both legislative houses in grand committee, retention is for life based on good behavior; South Carolina: initial selection and retention by "joint public vote of the general assembly, from a list of nominees supplied by the judicial screening committee"; South Dakota: initial selection by gubernatorial appointment, retention through submittal to the electorate (no competitive elections); Tennessee: merit selection through nominating commission for appellate level, partisan elections on district level, retention through nonpartisan election (updated information from American Judicature Society, *Judicial Selection Methods in the States*, at <http://www.ajs.org/select11.html> (last visited Jan. 31, 2002)); Texas: initial selection and retention by partisan election; Utah: initial selection through appointment by the governor, retention through an unopposed retention election; Vermont: initial selection by gubernatorial appointment, continuation in office unless voted out by the members of the general assembly; Virginia: initial selection and retention by "majority vote of both houses of the general assembly;" Washington: initial selection and retention through nonpartisan election; West Virginia: initial selection and retention through partisan elections; Wisconsin: initial selection and retention by nonpartisan election; Wyoming: initial selection through appointment by the governor, retention by nonpartisan uncontested judicial ballot. Thus, the majority of states (twenty-one, including D.C.) use some form of gubernatorial appointments, nine states have partisan elections, twelve utilize nonpartisan elections, and nine combine methods. American Judicature Society, *Judicial Selection Methods in the States*, at <http://www.ajs.org/select11.html> (last visited Jan. 31, 2002).

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reflect those differences in both general speech<sup>66</sup> and political

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66. The following is a listing of all state Canons or Codes of Judicial Ethics and their treatment of candidates' abilities to discuss their views on legal or political issues: ALABAMA CANONS OF JUDICIAL ETHICS Canon 7(B)(1)(c) (2001) (stating that a candidate for office by either public election or on the basis of the merit system shall not announce in advance his or her conclusions of law on pending litigation). The commentary to Canon 7(B) mentions that candidates may appear and speak on their own behalf at any function organized in support of his or her candidacy. Canon 7(B) cmt.; ALASKA CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(ii) (2000) ("A candidate for judicial office shall not make statements that commit or appear to commit the candidate to a particular view or decision with respect to cases, controversies or issues that are likely to come before the court . . ."). This wording is identical to the 1990 ABA Model Code of Judicial Conduct; Canon 5(B)(1)(d)(ii) (2001); ARIZONA CODE OF JUDICIAL CONDUCT (echoing the "commit or appear to commit . . . likely to come before the court" language of the 1990 ABA Code); ARKANSAS CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(ii) (2001) (using the familiar "commit" language); CALIFORNIA CODE OF JUDICIAL ETHICS Canon 5(B) (2001) (stating a "candidate for election or appointment to judicial office shall not make statements to the electorate or the appointing authority that commit or appear to commit the candidate with respect to cases, controversies, or issues that could come before the courts"); COLORADO RULES OF JUDICIAL DISCIPLINE Canon 7(B)(1)(c) (2000) (stating that a judge who is a candidate for retention should not "announce how the judge would rule on any case or issue that might come before the judge."); Canon 7(C)(1) ("A judge may attend and participate in nonpartisan gatherings at which legal or social issues are addressed, provided that the judge shall neither discuss cases in which he or she has participated that are not yet final, nor state how the judge would rule on any case or issue that might come before him or her."); The CONNECTICUT CODE OF JUDICIAL CONDUCT (2000) does not have any provisions concerning statements regarding legal or political issues within its appellate court system; The DELAWARE JUDGES' CODE OF JUDICIAL CONDUCT (2001) does not refer to the issue of legal or political speech, likely due to the lack of judicial elections; FLORIDA CODE OF JUDICIAL CONDUCT Canon 7(C)(3) (2001) (stating that a judicial candidate involved in election or re-election should avoid "expressing a position on any political issue" or any "affiliation with any political party" when attending and speaking at a political party function); GEORGIA CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(c) (2001) (sustaining the identical "commit or appear to commit" language of the 1990 ABA Model Code); The HAWAII CODE OF JUDICIAL CONDUCT (2001) does not specifically refer to matters of expression of political views; The IDAHO CODE OF JUDICIAL CONDUCT (2001) does not specifically refer to matters of expression of political views; ILLINOIS CODE OF JUDICIAL CONDUCT R. 67 Canon 7(A)(3)(d)(i) (2001) (expressing the ABA Model Code's "commit" language); INDIANA CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(ii) (2001) (reaffirming the ABA "commit" verbiage); IOWA CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(c) ("A judge who is a candidate for retention in judicial office . . . [s]hould not . . . announce views on disputed legal or political issues"); KANSAS CODE OF JUDICIAL CONDUCT R. 16-813 Canon 5(A)(3)(d)(ii) (2000) (restating the ABA 1990 Model Code "commit" language); KENTUCKY CODE OF JUDICIAL CONDUCT Canon 5(B)(1)(c) (1999) (echoing the ABA's "commit" language); LOUISIANA CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(d)(ii) (2001) (reaffirming the 1990 ABA Code language); MAINE CODE OF JUDICIAL CONDUCT Canon 5(B)(1)(b) (2000) (stating the 1990 ABA Code "commit" language for candidates seeking appointment to

judicial office); MARYLAND CODE OF JUDICIAL CONDUCT Canon 5(B)(5) (2001) ("A judge who is a candidate for election, re-election, or retention to judicial office may engage in partisan political activity allowed by law with respect to such candidacy, except that the judge . . . should not . . . announce the judge's views on disputed legal or political issues . . ."); The MASSACHUSETTS CODE OF JUDICIAL CONDUCT (2001) does not specifically refer to matters of expression of political views; The MICHIGAN CODE OF JUDICIAL CONDUCT (2001) does not specifically refer to matters of expression of political views; MINNESOTA CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2000) (stating that a candidate shall not "announce his or her views on disputed legal or political issues"); MISSISSIPPI CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(c) (2001) (declaring that candidates should not announce their views on "disputed legal or political issues."); It is interesting to note that notwithstanding Canon 7's "announce clause." Candidates may attend political gatherings, speak to those gatherings on their own behalf, identify themselves as members of a political party and contribute to political parties. Canon 7(A)(2); MISSOURI CODE OF JUDICIAL CONDUCT Canon 5(B)(1)(c) (2001) (stating that candidates shall not announce views on disputed legal issues). Unlike other "announce clause" provisions, Missouri's prohibits announcing views on legal issues, but does not reference political issues. *Id.*; MONTANA CANONS OF JUDICIAL ETHICS Canon 30 (1963), *available at* <http://www.lawlibrary.state.mt.us/dscgi/ds.py/View/Collection-2931> (last visited Oct. 22, 2001) (restating the 1924 ABA Canons of Judicial Ethics language that the candidate "should not announce in advance his conclusions of law on disputed issues to secure class support"); NEBRASKA CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(ii) (2000) (repeating the 1990 ABA Code "commit" language for candidates seeking appointment to judicial office); NEVADA CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(ii) (2001) (restating the ABA 1990 Model Code "commit" language); The NEW HAMPSHIRE CODE OF JUDICIAL CONDUCT (2001) does not refer to judicial candidates due to New Hampshire's method of judicial selection; The NEW JERSEY CODE OF JUDICIAL CONDUCT (2001) does not refer to judicial candidates due to New Jersey's method of judicial selection; NEW MEXICO CODE OF JUDICIAL CONDUCT R. 21-700(B)(4) (2000) (stating that candidates for judicial election shall not make statements that commit or appear to "commit the candidate with respect to cases, controversies or issues that are likely to come before the court" nor "announce how the candidate would rule on any case or issue that may come before the court"); NEW YORK CODE OF JUDICIAL CONDUCT Canon 5(A)(4)(d)(ii) (2001) (restating the ABA's 1990 "commit" language); The NORTH CAROLINA CODE OF JUDICIAL CONDUCT (2001) does not contain a specific provision limiting a candidate's ability to discuss legal or political issues or issues likely to come before the court; NORTH DAKOTA CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(ii) (2001) (repeating the 1990 ABA Model Code "commit" provision); OHIO CODE OF JUDICIAL CONDUCT Canon 7(B)(2)(d) (2001) (stating the familiar "commit or appear to commit" language of the ABA Code); OKLAHOMA CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(ii) (2001) (restating the ABA Code "commit" expression); The OREGON CODE OF JUDICIAL CONDUCT (1999) does not specifically limit candidates' speech concerning legal or political issues; PENNSYLVANIA CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(c) (2001) (stating that a candidate should not "announce his views on disputed legal or political issues"); RHODE ISLAND CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(ii) (2001) (using the ABA Code's "commit or appear to commit" language); SOUTH CAROLINA CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(ii) (2000) (restating the "commit" provision of the ABA Code); SOUTH DAKOTA CODE OF JUDICIAL CONDUCT Canon

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gathering provisions.<sup>67</sup> States may freely modify or reject any or all

5(A)(3)(d)(ii) (2000) (reaffirming the ABA Code's "commit or appear to commit" language); TENNESSEE CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(ii) (2001) (using the ABA "commit or appear to commit" verbiage); TEXAS CODE OF JUDICIAL CONDUCT Canon 5(1) (2001) ("A judge or judicial candidate shall not make statements that indicate an opinion on any issue that may be subject to judicial interpretation by the office which is being sought or held, except that discussion of an individual's judicial philosophy is appropriate if conducted in a manner which does not suggest to a reasonable person a probable decision on any particular case."). Likewise, a "judge or judicial candidate may . . . express his or her views on political matters." Canon 5(3); UTAH CODE OF JUDICIAL CONDUCT Canon 5(B)(4) (2000) (stating that candidates who have been confirmed by the senate shall not "take a public position on a non-partisan political issue which would jeopardize the confidence of the public in the impartiality of the judicial system."). Utah's Code also contains a blanket statement directing candidates for selection by the judicial nominating commission not to "engage in political activities that would jeopardize the confidence of the public or of governmental officials in the political impartiality of the judicial branch of government" Canon 5(A); VERMONT CODE OF JUDICIAL CONDUCT Canon 5(B)(4)(b) (2000) (restating the familiar ABA language of making statements that "commit or appear to commit" them to issues "likely to come before the court"); The CANONS OF JUDICIAL CONDUCT FOR THE STATE OF VIRGINIA, (2000) do not stipulate provisions for candidates announcing views on legal or political issues due to Virginia's method of judicial selection; WASHINGTON CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(ii) (2000) (using the ABA Code's "commit" language); WEST VIRGINIA CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(ii) (2001) (reaffirming the ABA Code "commit or appear to commit" language); The WISCONSIN CODE OF JUDICIAL CONDUCT, R. 60.06(3) (2001) does not presently specifically mention a limit on a non-incumbent candidate's ability to announce his or her views on legal or political issues, but does prohibit a judge from doing anything that "would commit the judge or appear to commit the judge in advance with respect to any particular case or controversy or which suggests that, if elected or chosen, the judge would administer his or her office with partiality, bias or favor."; WYOMING CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(ii) (2000) (using the "commit or appear to commit" language of the 1990 ABA Model Code).

67. The following is a listing of all state Canons or Codes of Judicial Ethics and their treatment of candidates' abilities concerning attendance and/or speech at political gatherings: ALABAMA CANONS OF JUDICIAL ETHICS Canon 7(A)(1) (2001). This provision explains in pertinent part that

so long as judges are subject to nomination and election as candidates of a political party, it is realized that a judge or a candidate for election to a judicial office cannot divorce himself or herself completely from political organizations and campaign activities which, indirectly or directly, may be involved in his or her election or re-election. Nevertheless, should a judge or a candidate for a judicial position be directly or indirectly involved in the internal workings or campaign activities of a political organization, it is imperative that he or she at all times conduct himself or herself in such a manner as to prevent any political considerations, entanglements, or influences from ever becoming involved in or from ever appearing to be involved in any judicial decision or in the judicial process.

*Id.*; ALASKA CODE OF JUDICIAL CONDUCT Canon 5(A)(1)(d) (2000) (requiring all



judges and candidates for appointment to judicial office not attend political gatherings unless he or she is a non-judge candidate); ARIZONA CODE OF JUDICIAL CONDUCT Canon 5(A)(1)(d) (2001) ("A judge or a candidate for election to judicial office shall not actively take part in any political campaign other than his or her own election, reelection or retention in office"); Canon 5(A)(2) ("A judge or a non-judge who is a candidate for judicial office may speak to political gatherings on his or her own behalf."); ARKANSAS CODE OF JUDICIAL CONDUCT Canon 5(A)(1)(d) (2001) (judges and candidates shall not attend political gatherings unless a non-judge candidate for appointment to judicial office or a candidate subject to public election. A judge or candidate subject to public election may identify himself or herself as a political party member and when a candidate speak to gatherings on his or her own behalf); CALIFORNIA CODE OF JUDICIAL ETHICS Canon 5(C) (2001) ("Candidates for judicial office may speak at political gatherings only on their behalf or on behalf of another candidate for judicial office."); COLORADO RULES OF JUDICIAL DISCIPLINE Canon 7(B)(2) (2000) (declaring that a judicial candidate for retention in office should abstain from campaign activity in connection with his or her own candidacy unless there is active opposition to that judge's retention in office, in which case the candidate may request the organization of a nonpartisan committee advocating his or her retention); Canon 7(C) (stating that the judge may "attend and participate in nonpartisan gatherings at which legal or social issues are addressed."); CONNECTICUT CODE OF JUDICIAL CONDUCT, Canon 7(a)(3) (2000) (declaring that a judge should not attend political gatherings (because Connecticut does not have judicial elections. WARRICK, *supra* note 65.)); THE DELAWARE JUDGES' CODE OF JUDICIAL CONDUCT (2001) does not refer to the issue of candidates attending political gatherings, likely due to the lack of judicial elections; FLORIDA CODE OF JUDICIAL CONDUCT, Canon 7(A)(1)(d) (2001) (declaring a judge or candidate shall not attend political party functions unless a non-judge candidate for appointment to judicial office or unless involved in election or re-election. However, any invitation to speak at a political party function must include all other candidates for that office and the candidate should not comment on his or her affiliation with that political party. Also, any candidate attending a political party function "must avoid conduct that suggests or appears to suggest support or opposition to a political party, a political issue, or another candidate"); GEORGIA CODE OF JUDICIAL CONDUCT Canon 7(A)(2) (2001) ("Judges holding an office filled by public election between competing candidates, or candidates for such office, may attend political gatherings and speak to such gatherings on their own behalf when they are candidates for election or re-election."); HAWAII CODE OF JUDICIAL CONDUCT Canon 5(A)(1)(d) (2001) (stating that a judge or candidate shall not attend political gatherings). The commentary further mentions that those judges and candidates retain the right to "participate in the political process as a voter." Canon 5(A)(1)(2001) cmt.; THE IDAHO CODE OF JUDICIAL CONDUCT Canon 7(A) (2001) does not specifically disallow attendance or speech at political events, but retains the 1990 ABA Model Code's prohibition on making speeches for political organizations (the ABA Code does, however, allow this practice in certain circumstances for candidates subject to public election, ABA MODEL CODE OF JUDICIAL CONDUCT, Canon 5(A)(1)(c) (1990); ILLINOIS CODE OF JUDICIAL CONDUCT R. 67 Canon 7(B)(1)(a)(i),(ii) (2001) ("A judge or candidate may . . . attend political gatherings; identify himself or herself as a member of a political party;"); Canon 7(B)(1)(b)(i) (2001) (stating that when a candidate for public election, he or she may "speak to gatherings on his or her own behalf"); INDIANA CODE OF JUDICIAL CONDUCT Canon 5(A)(1)(d) (2001) (directing that candidates shall not

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attend gatherings of political organizations unless a candidate subject to public election); IOWA CODE OF JUDICIAL CONDUCT Canon 7(A)(1)(c) (2001) (stating that judges should not attend political gatherings (no provision concerning political gatherings directly applies to candidates)); KANSAS CODE OF JUDICIAL CONDUCT Canon 5(A)(1)(d) (directing that candidates may attend political gatherings unless a nonjudge candidate for appointment to judicial office or subject to public election (in which case the candidate may permit his or her name to be "listed on election materials."); KENTUCKY CODE OF JUDICIAL CONDUCT Canon 5(A)(2) (1999) (stating that a judge or a candidate for election may purchase tickets to and attend political gatherings and may speak to such gatherings on the candidate's own behalf, however, a candidate cannot identify himself or herself as a member of a political party when speaking to a gathering. If not initiated by the candidate for such office, and only in answer to a direct question, the judge or candidate may identify himself or herself as a member of a particular political party); LOUISIANA CODE OF JUDICIAL CONDUCT Canon 7(C) (2001) (stating that judicial candidates may at any time attend political gatherings, identify themselves as members of political parties and speak to gatherings on their own behalf); MAINE CODE OF JUDICIAL CONDUCT Canon 5(A)(1)(d) (2000) (declaring that incumbent judges shall not attend political gatherings (no comparable provision exists for candidates seeking appointment)); MARYLAND CODE OF JUDICIAL CONDUCT Canon 5(B) (2001) (declaring that judges who are candidates for election, re-election, or retention to judicial office are allowed to engage in partisan political activities (no condition, therefore, details attendance at political gatherings)); MASSACHUSETTS CODE OF JUDICIAL CONDUCT Canon 7(A)(1)(c) (2001) (affirming that a judge should not attend political gatherings (the lack of candidate provisions is expected given Massachusetts' judicial selection process, *see supra* note 65)); MICHIGAN CODE OF JUDICIAL CONDUCT Canon 7(A)(2) (2001) (stating that a judge or candidate may both attend political gatherings and speak to those gatherings); MINNESOTA CODE OF JUDICIAL CONDUCT Canon 5(A)(1)(d) (2000) (declaring that candidates shall not attend political gatherings); MISSISSIPPI CODE OF JUDICIAL CONDUCT Canon 7(A)(1)(c) (2001) (affirming a candidate should not attend political gatherings unless a candidate for office filled by public election); MISSOURI CODE OF JUDICIAL CONDUCT Canon 5(A)(2) (2001) ("Where it is necessary that a judge be nominated and elected as a candidate of a political party, an incumbent judge or candidate for election to judicial office may attend or speak on the judge or candidate's own behalf at political gatherings . . ."); MONTANA CANONS OF JUDICIAL ETHICS Canon 28 (1963) *available at* <http://www.lawlibrary.state.mt.us/dscgi/ds.py/View/Collection-2931> (last visited Oct. 22, 2001) (restating the 1924 ABA Canons of Judicial Ethics language that the candidate "should avoid making political speeches . . . and participation in party conventions."); NEBRASKA CODE OF JUDICIAL CONDUCT Canon 5(A)(1)(d) (2000) (stating that candidates shall not attend political gatherings unless a "non-judge candidate for appointment to judicial office" or a candidate subject to retention election); NEVADA CODE OF JUDICIAL CONDUCT Canon 5(C)(1)(a)(i) (2001) (declaring that candidates subject to public election may attend political gatherings). The 2000 amendment to this canon permits candidates to identify their political party membership upon request but cannot align themselves with political parties. Canon 5(C)(1) cmt.; The NEW HAMPSHIRE CODE OF JUDICIAL CONDUCT (2001) does not refer to judicial candidates due to New Hampshire's method of judicial selection; The NEW JERSEY CODE OF JUDICIAL CONDUCT (2001) does not refer to judicial candidates due to New Jersey's method of judicial selection (although judges are not to "attend political functions that are likely to

be considered as being political in nature). Canon 7(A)(3); NEW MEXICO CODE OF JUDICIAL CONDUCT R. 21-700(B) (2000) ("Candidates for election to judicial office in partisan, nonpartisan and retention elections, including judges, lawyers and non-lawyers, are permitted to participate in the electoral process . . . [all candidates] may speak at public meetings," but in a nonpartisan election may not use advertising containing any reference to his or her affiliation with a political party). Incumbent judges may attend political gatherings and identify themselves as members of political parties. R. 21-700(A)(2); NEW YORK CODE OF JUDICIAL CONDUCT Canon 5(A)(1)(g) (2001) (reaffirming a candidate for election to judicial office shall not "directly or indirectly engage in any political activity" including attending political gatherings). Of course, a judge or non-judge who is a candidate for a judicial office via public election may "purchase two tickets to, and attend, politically sponsored dinners and other functions." Canon 5(A)(2)(v); NORTH CAROLINA CODE OF JUDICIAL CONDUCT Canon 7(A)(2) (2001) ("A judge holding an office filled by public election between competing candidates, or a candidate for such office, may attend political gatherings, speak to such gatherings, identify himself as a member of a political party, and contribute to a political party or organization."); NORTH DAKOTA CODE OF JUDICIAL CONDUCT Canon 5(A)(1)(f) (2001) (declaring that candidates for election shall not attend political gatherings unless subject to public election, in which case he or she may "speak on behalf of his or her own candidacy . . . whether or not at a gathering sponsored by a political organization;"); OHIO CODE OF JUDICIAL CONDUCT Canon 7(B)(3) (2001) (declaring that judicial candidates may "attend political gatherings and speak to political gatherings."). Candidates may also identify themselves as members of political parties. Canon 7(B)(3)(b)-(c); The OKLAHOMA CODE OF JUDICIAL CONDUCT (2001) does not specifically restrain judicial candidates subject to public election from attending political gatherings; The OREGON CODE OF JUDICIAL CONDUCT JR 4-102(C) (1999) (explaining that candidates cannot publicly identify themselves as members of a political party "other than by registering to vote"); PENNSYLVANIA CODE OF JUDICIAL CONDUCT Canon 7(A)(2) (2001) (stating that candidates for election to judicial office should not attend political gatherings unless he or she is "[a] judge holding an office filled by public election between competing candidates, or a candidate for such office" in which case he or she may attend, speak, and identify himself or herself as a member of a political party); RHODE ISLAND CODE OF JUDICIAL CONDUCT Canon 5(A)(1)(d) (2001) (pronouncing that all candidates shall not attend political gatherings unless a non-judge candidate seeking appointment to judicial office); SOUTH CAROLINA CODE OF JUDICIAL CONDUCT Canon 5(A)(1)(d) (2000) (proclaiming that candidates shall not attend political gatherings unless a "non-judge candidate for appointment to judicial office" or a candidate "subject to public election"); SOUTH DAKOTA CODE OF JUDICIAL CONDUCT Canon 5(A)(1)(d) (2000) (forbidding candidates to attend political gatherings unless a non-judge candidate or subject to public election); TENNESSEE CODE OF JUDICIAL CONDUCT, Canon 5(C)(1)(i) (2001) (allowing candidates to attend political gatherings); TEXAS CODE OF JUDICIAL CONDUCT Canon 5(3) (2001) ("A judge or judicial candidate may attend political events and express his or her views on political matters in accord with this Canon . . ."); UTAH CODE OF JUDICIAL CONDUCT Canon 5(B)(3) (2000) (mandating that candidates for judicial office already confirmed by the Senate shall not attend political gatherings). In terms of candidates still subject to selection by the nominating commission, Utah's Code provides a blanket statement that those candidates "shall not engage in political activities that would jeopardize the confidence of the public or of governmental officials in the political impartiality of

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of the ABA Code. The vast majority of changes states do make to the Model Code concern the political activity of judges.<sup>68</sup>

In 1950, the Minnesota District Judges Association adopted the American Bar Association's 1924 Canons of Judicial Ethics.<sup>69</sup> The Minnesota Supreme Court in 1974 promulgated a revised code of ethics based largely on the 1972 ABA Code of Judicial Conduct.<sup>70</sup> In 1993, the Minnesota Supreme Court established the Minnesota Supreme Court Advisory Committee to Review the American Bar Association Model Code of Judicial Conduct and the Rules of the Minnesota Board on Judicial Standards to evaluate the 1990 ABA Model Code of Judicial Conduct and the Rules of the Minnesota Board on Judicial Standards.<sup>71</sup>

Among the proposals set forth was a suggested Canon 5(A)(3)(d) that "[r]eplaces [the] previous blanket prohibition against announcing views on disputed legal or political issues with [a] prohibition against making statements that commit or appear to commit the candidate with respect to cases, controversies or

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the judicial branch of government" Canon 5(A). Further, those candidates shall not "seek support or invite opposition to the candidacy because of membership in a political party." Canon 5(A)(3); VERMONT CODE OF JUDICIAL CONDUCT Canon 5(B)(4)(e) (2000) (forbidding candidates for appointment or confirmation or retention from engaging in any political activity to obtain the appointment, except that those candidates may seek support and endorsement from organizations and if not they are not an incumbent judge, they may participate in political caucuses and meetings); The CANONS OF JUDICIAL CONDUCT FOR THE STATE OF VIRGINIA, (2000) do not specify attendance at political gatherings for candidates due to Virginia's judicial selection method, however, sitting judges shall not attend such gatherings, Canon 5(A)(1)(c); WASHINGTON CODE OF JUDICIAL CONDUCT Canon 5(A)(1)(d) (2000) (stating that all candidates shall not attend gatherings of political organizations unless a non-judge candidate who is appointed or a candidate subject to public election); WEST VIRGINIA CODE OF JUDICIAL CONDUCT Canon 5(C)(1)(a) (2001) (allowing candidates to attend political gatherings and identify themselves as members of a political party); The WISCONSIN CODE OF JUDICIAL CONDUCT (2001) does not presently specifically limit candidate's attendance at political gatherings, but does prohibit judges from participating in political party affairs, see R. 60.06(2), however, judges may attend a political meeting as a member of the public but not as a participant, see Commentary to Rule 60.06(2); WYOMING CODE OF JUDICIAL CONDUCT Canon 5(A)(1)(d) (2000) (disallowing candidates to attend political gatherings unless a non-judge candidate for appointment to judicial office or a candidate subject to public election).

68. MCFADDEN, *supra* note 44, at 14.

69. Republican Party of Minnesota v. Kelly, 247 F.3d 854, 857 (8th Cir. 2001).

70. *Id.*

71. Final Report, Advisory Committee to Review the American Bar Association Model Code of Judicial Conduct and the Rules of the Minnesota Board on Judicial Standards 1 (1994) [hereinafter "Advisory Committee"].

issues that are likely to come before the court.”<sup>72</sup> The committee was wary of constitutional issues arising from the current language and “felt the present Minnesota provision would clearly be challenged.”<sup>73</sup> The committee supported its concerns in the report. “Code provisions identical to the present Minnesota provision have been successfully challenged in three of four cases as unconstitutionally vague and overbroad.”<sup>74</sup> The three cases cited as successfully challenging the present provision were *American Civil Liberties Union, Inc. v. The Florida Bar*,<sup>75</sup> *J.C.J.D v. R.J.C.R.*,<sup>76</sup> and *Beshear v. Butt*,<sup>77</sup> with the unsuccessful challenge coming in *Stretton v. Disciplinary Board Of Supreme Court Of Pennsylvania*.<sup>78</sup> The committee noted that in *Stretton*, the court “was forced to adopt a narrow construction”<sup>79</sup> of the provision and that in another case, *Buckley v. Illinois Judicial Inquiry Board*,<sup>80</sup> in which the narrow construction was “expressly stated in the code,” the provision was “struck down as unconstitutionally vague and overbroad.”<sup>81</sup> The committee also documented the fact that the 1990 ABA provision had already survived a constitutional challenge.<sup>82</sup>

Concerning a candidate’s ability to attend political gatherings, the advisory committee did not follow the 1990 ABA Model Code language allowing judges or candidates subject to public election to

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72. *Id.* at 2.

73. *Id.* at 5 n.6.

74. *Id.*

75. *American Civil Liberties Union, Inc. v. The Florida Bar*, 744 F.Supp. 1094, 1094 (N.D. Fla. 1990).

76. *J.C.J.D v. R.J.C.R.*, 803 S.W.2d 953, 953 (Ky. 1991).

77. *Beshear v. Butt*, 773 F.Supp. 1229, 1229 (E.D. Ark. 1991) *rev’d on procedural grounds*, No. 91-3426EA, 1992 WL 119188, at \*2 (8<sup>th</sup> Cir. June 4, 1992).

78. *Stretton v. Disciplinary Bd. Of S. Ct. of Pa.*, 944 F.2d 137, 137 (3rd Cir. 1991).

79. *Id.* The construction adopted in *Stretton* was that the canon’s use of “announcing one’s views” was limited to “situations in which the candidate’s speech pertains to matters that may come before the court for resolution.” *Id.* at 143. The court reasoned that the state judicial board had previously adopted the “narrow construction” position in prior litigation, a narrow construction was consistent with other provisions of the Judicial Code, and the practice that “every reasonable construction must be resorted to, in order to save a statute from unconstitutionality,” was proper. Therefore, the court was “persuaded that the broad interpretation of [the canon] urged upon us by plaintiff would be rejected by the state Supreme Court and that it would adopt the construction advanced by the Boards here.” *Id.* at 143-44.

80. *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 224 (7th Cir. 1993).

81. Advisory Committee, *supra* note 73.

82. *Id.* The case cited was *Ackerson v. Kentucky Jud. Ret. & Removal Com’n*, 776 F.Supp. 309, 309 (W.D. Ky. 1991).

attend political gatherings and identify themselves as members of political parties, instead adding to their proposed Canon 5(C) only those parts of the 1990 Code allowing such candidates to speak to gatherings on their own behalf, appear in media advertisements to support their candidacy, and distribute promotional campaign literature.<sup>83</sup>

On February 8, 1995, the Minnesota Supreme Court ordered a hearing, set for April 12, 1995, to consider the advisory committee's recommendations from its final report.<sup>84</sup> The order allowed those desiring to submit written statements or make oral presentations to do so.<sup>85</sup>

In response to the court order, Honorable Thomas R. Butler, Chair of the Advisory Committee, submitted a written report concerning the committee's recommendations.<sup>86</sup> In this report, Judge Butler outlined the following reasons for siding with the ABA's language. First, the constitutionality of the present language was suspect while the proposed language had already been construed to be constitutional. Second, disciplinary proceedings would be uncommon because a candidate would, according to the commentary to Canon 5(A)(3), "emphasize in any public statement the candidate's duty to uphold the law regardless of his or her personal views."<sup>87</sup> Third, the ABA version attempted to "strike the balance" between the difficulty of prosecution and the need of the voters to know more about their candidates. Fourth, any statement that would violate the existing rule would not necessarily be dealt with before election day.<sup>88</sup> Fifth, in two prior Minnesota cases involving lawyer candidates violating the existing rule, the lawyers'

83. Advisory Committee, *supra* note 71 at app. Code of Judicial Conduct Comparison, at 44.

84. Order for Hearing to Consider Proposed Amendments to the Code of Judicial Conduct and the Rules of the Minnesota Board on Judicial Standards 1995.

85. *Id.*

86. Letter from Hon. Thomas R. Butler, Chair, Advisory Committee to Review the American Bar Association Model Code of Judicial Conduct and the Rules of the Minnesota Board of Judicial Standards, to Frederick Grittner, Clerk of the Appellate Courts, (April 4, 1995) (on file with the Clerk of Appellate Courts, Minnesota Judicial Center) [hereinafter "Butler Letter"].

87. Advisory Committee, *supra* note 71 at app. Code of Judicial Conduct Comparison, at 42.

88. For example, any announcement or statement made immediately before the general election could "turn the tide of the election and no disciplinary proceeding could even be commenced before election day has passed." Butler Letter, *supra* note 86, at 11.

disciplinary board took no action against the candidate. Sixth, neither the lawyers' board nor judges' board had the economic resources to defend the existing language.<sup>89</sup>

Among the other submissions filed was a letter on behalf of the Minnesota District Judges Association, who "voted to support the adoption of the recommendations of the Minnesota Supreme Court Advisory Committee, except for . . . proposed Canon 5(A)(3)(d)."<sup>90</sup> The Minnesota Conference of Chief Judges "endorsed the recommendations in the report with one exception" which was the proposed Canon 5(A)(3)(d).<sup>91</sup> Similarly, the Court Rules and Administration Committee of the Minnesota State Bar Association reviewed the report and at their midyear meetings in January 1995, the MSBA's Board of Governors and House of Delegates voted to support all amendments proposed except Canon 5(A)(3)(d).<sup>92</sup> In that oral report, The MSBA did recognize the Advisory Committee's arguments concerning constitutional issues and prior case law, but sided with the District Judges Association and the Conference of Chief Judges in recommending that the supreme court adopt all proposed amendments except that of Canon 5(A)(3)(d), of which a recommendation was made that "additional study be undertaken concerning the possible effects of changing the political speech provisions . . . before such a change is made."<sup>93</sup>

While judges generally were averse to Canon 5(A)(3)(d), at least one lawyer urged the adoption by the court of Canon 5. Attorney Lauren Maker stressed "the side effect of chilling all free speech rights" of the existing Canon 7.<sup>94</sup> She further emphasized that

[t]he press gives little or no coverage to these races,

89. Butler Letter, *supra* note 86, at 10-12.

90. Letter from Elizabeth Hayden, President, Minnesota District Judges Association, to Frederick Grittner, Clerk of the Appellate Courts, (April 6, 1995) (on file with the Clerk of Appellate Courts, Minnesota Judicial Center).

91. Letter from Kevin S. Burke, Chair, Conference of Chief Judges, to Frederick Grittner, Clerk of the Appellate Courts, (March 17, 1995) (on file with the Clerk of Appellate Courts, Minnesota Judicial Center).

92. Letter from Candice M. Hojan, Court Rules and Administration Committee, MSBA, to Office of Appellate Courts, (March 31, 1995) (on file with the Clerk of Appellate Courts, Minnesota Judicial Center).

93. *Id.* at 3.

94. Letter from Lauren K. Maker, Attorney, to the Supreme Court of Minnesota, (April 7, 1995) (on file with the Clerk of Appellate Courts, Minnesota Judicial Center).

because, as one reporter told me, all the candidates can say is that they are qualified and they will be fair. Even the League of Women Voters was hesitant to hold a candidates' forum for judicial races, because it was perceived that Canon 7 prevented them from asking about any issues of substance from the candidates . . . . The cornerstone to a true democracy is the free exercise of universal franchise by an educated and informed electorate.<sup>95</sup>

On November 1, 1995, the supreme court ordered the promulgation of the amendments to the Minnesota Code of Judicial Conduct, effective January 1, 1996.<sup>96</sup> The committee's proposed Canon 5(A)(3)(d) was not adopted.

In September 1997 the Minnesota Board on Judicial Standards petitioned the supreme court to "clarify the nonpartisan nature of judicial elections."<sup>97</sup> The supreme court ordered hearings concerning the Greg Wersal issue, which centered primarily on endorsements and what constituted a political party.<sup>98</sup> The court adopted these recommendations, effective January 1, 1998.<sup>99</sup>

#### IV. THE DECISION

The Eighth Circuit Court wisely chose strict scrutiny as the standard of review after much contemplation, but it was not a black and white decision. The reasons the court used the highest

95. *Id.* at 1-2.

96. Order of Minnesota Supreme Court, Promulgation of Amendments to the Minnesota Code of Judicial Conduct and Rules of Board on Judicial Standards (Nov. 1, 1995) (No. C4-85-697).

97. *Republican Party of Minnesota v. Kelly*, 247 F.3d 854, 859 (8th Cir. 2001).

98. *Id.*

99. Order of the Minnesota Supreme Court Amending Canon 5 of the Code of Judicial Conduct, (Dec. 23, 1997) No. C7-81-300. Comparing the 1998 and 1996 versions of the Code of Judicial Conduct Canon 5(A)(1)(a) in both states that judges or candidates shall not "act as a leader or hold any office in a political organization;" with the 1998 version adding, "identify themselves as members of a political organization, except as necessary to vote in an election." MINNESOTA CODE OF JUDICIAL CONDUCT Canon 5(A)(1)(a) (1998); Canon 5(A)(1)(d) in both states that judges or candidates shall not "attend political gatherings;" with the 1998 version adding, "or seek, accept or use endorsements from a political organization." MINNESOTA CODE OF JUDICIAL CONDUCT Canon 5(A)(1)(d) (1998). Similarly, Canon 5(B)(1)(a) in the 1996 version declared that a judge or candidate may unless prohibited by law "speak to gatherings on his or her own behalf." The present language adopted in 1998 clarifies this as "speak to gatherings, other than political organization gatherings, on his or her own behalf." MINNESOTA CODE OF JUDICIAL CONDUCT Canon 5(B)(1)(a) (1998).



possible level of review are crucial and must be remembered throughout the evaluation of the case.

The standard of review in First Amendment cases is not necessarily strict scrutiny, and the court explained that early.<sup>100</sup> The court pointed out that while prior cases showed, for example, that other courts had reviewed contribution limits for non-judicial office under a lesser standard than strict scrutiny,<sup>101</sup> the political speech of candidates for judicial office is different than that of candidates for legislative or executive office.<sup>102</sup> The court stated that in the executive and legislative areas, “the public has a right to know the details of the programs that candidates propose to enact into law and administer.”<sup>103</sup> However, the “neutral, decision making nature of the judicial function” separates judges and other governmental officials and “[t]he judicial candidate simply does not have a First Amendment right to promise to abuse his office.”<sup>104</sup> From the State’s perspective, “restrictions on Minnesota judicial candidates’ speech are entirely different from limitations on the speech of candidates for partisan office.”<sup>105</sup>

The court then examined *United States Civil Service Commission v. National Association of Letter Carriers*,<sup>106</sup> in which the Hatch Act, prohibiting federal employees from actively participating in political campaigns, was challenged.<sup>107</sup> There, because the restrictions imposed did not discriminate on the basis of viewpoint, the court used a balancing test less rigorous than strict scrutiny.<sup>108</sup> Naturally, the defendants in *Kelly* suggested that lesser standard of review was appropriate here.<sup>109</sup> However, the court, even though stating that the balancing test of *Letter Carriers* would apply to Wersal as a potential government employee, recognized that Canon

100. *Republican Party of Minnesota v. Kelly*, 247 F.3d 854, 862 (8th Cir. 2001) (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997)) (“[r]egulations imposing severe burdens on plaintiffs’ rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review . . .”).

101. *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 386-89 (2000).

102. *Kelly*, 247 F.3d at 862.

103. *Id.*

104. *Id.*

105. *Id.* at 863.

106. 413 U.S. 548 (1973).

107. *Id.* at 550.

108. *Id.* at 564.

109. *Kelly*, 247 F.3d at 864.

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5 restrained election activity of the candidates themselves.<sup>110</sup> It then stated, “[t]he burden on the plaintiff in either case may be comparable, but the public’s interest in free speech is greater where the person subject to restrictions is a candidate for public office, *about whom the public is obliged to inform itself*.”<sup>111</sup> For that reason, the court invoked strict scrutiny.<sup>112</sup>

Thus, the court applied a critical generality to the overall picture of this case even before deciding its merits. While the court seemed to begin its “review” analysis suggesting that the distinction between the public’s right to know about legislative and judicial candidates was important enough to require differing standards with respect to the people’s freedom of speech, that very right of the public was the deciding factor to applying strict scrutiny when the free speech restriction was imposed on candidates for public office.<sup>113</sup>

As with all strict scrutiny decisions involving the First Amendment of the U.S. Constitution, the State must first establish that it has a “compelling reason” for the regulation imposed and that the regulation is narrowly tailored to serve that interest.<sup>114</sup>

In terms of the compelling interest of the State of Minnesota, the court expressed the importance of the independence of the judiciary and declared, “[t]here is simply no question but that a judge’s ability to apply the law neutrally is a compelling

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110. *Id.*

111. *Id.*

112. *Id.* Indeed, strict scrutiny is recognized as the proper standard of review in the literature.

Rules that place *direct* limits on what candidates may say or do in their campaigns, such as those that commonly appear in codes of judicial ethics, have been subjected to special scrutiny. In order to justify these restrictions, courts have often required that the state demonstrate a “compelling state interest” in its regulation, and that the regulations be tailored narrowly to the purposes they seek to accomplish.

McFADDEN, *supra* note 44 at 70.

113. *Kelly*, 247 F.3d at 864.

114. *Stretton v. Disciplinary Bd. of Sup. Ct. of Pa.*, 944 F.2d 137, 141-142 (3d Cir. 1991). “The First Amendment surely requires that the restriction be demonstrably supported by not only a legitimate state interest, but a compelling one, and that the restriction operates without unnecessarily circumscribing protected expression.” *Id.* (stating that the two facets to the analysis of a First Amendment infringement case implicating a restriction on political speech). The test has also been described, as it is in this case, as the State having to “show that the ‘regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.’” *Burson v. Freeman*, 504 U.S. 191, 198 (1992).

governmental interest of the highest order.”<sup>115</sup> The question is, what is truly meant by the term “independent?” It appears there are two possibilities that require further exploration. Either independence means literally free from all external (and consequently personal internal) influences, or it means free from the appearance of dependence on those influences.

If the former, does the State genuinely have an interest in completely independent judges, that is, judges who decide cases with no preconceived notions, no preformed thoughts, no subjective ideas or personal principles from which to draw? Are they to decide cases within a moral vacuum? Being impartial is uncontroversial in the context of freedom from personal bias for or against litigants in that judge’s court, but becomes controversial if judges are required to “avoid the influence of their own moral, social or political views in their decision making.”<sup>116</sup> The court, quoting *Stretton*, further stated that

[i]n those [executive and legislative] areas, the public has the right to know the details of the programs that candidates propose to enact into law and administer. Pledges to follow certain paths are not only expected, but are desirable so that voters may make a choice between proposed agendas that affect the public. By contrast, the judicial system is based on the concept of individualized decisions on challenged conduct and interpretations of law enacted by the other branches of government.<sup>117</sup>

The fact of the matter is that interpretation of law naturally has to include one’s own viewpoint, regardless of the historical record or documentation available. If the plain language of the law is clear, no judicial determination is needed. The problem is that the more complex the issue, the more convoluted the particular law, the more nebulous the supporting documentation, then the more necessary it is that a judge will use his or her inherent value system. Voters need to be fully aware of this vital concept so that they can accurately and soundly “make a choice between proposed agendas that affect the public.”<sup>118</sup> In fact, the increasing concern of what many refer to as judicial activism makes it imperative that voters know a judge’s value system.<sup>119</sup>

115. *Kelly*, 247 F.3d at 864.

116. MCFADDEN, *supra* note 44, at 71.

117. *Kelly*, 247 F.3d at 862.

118. *Id.*

119. Judicial activism is the “philosophy . . . whereby judges allow their

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The court further declared that even though the methods of judicial selection among the states and of the federal system are varied, the “explicit or implicit” goal in either is to maintain “an independent judiciary as free from political, economic and social pressure as possible so judges can decide cases without those influences.”<sup>120</sup> Of course, even though the federal system of appointment is different than Minnesota’s electoral system, no one can doubt the importance to many Americans of the political affiliation of the President of the United States when a Supreme Court vacancy arises.<sup>121</sup> “Those who claim switching to an appointed judicial system would remove politics from the courts are naïve . . . . In reality . . . there may be only a handful of judges who earned their appointments based solely on merit and not on partisanship.”<sup>122</sup>

In recent years, the selection of Supreme Court justices has been a most heated and political battle. Concerning the conflict with Supreme Court nominee Robert H. Bork, “[u]nlike the Fortas, Haynsworth, and Carsell cases, where much of the Senate debate focused on non-ideological considerations such as ethics and competence, the deliberations on Bork centered on the nominee’s ideology.”<sup>123</sup> Will current and future federal appointment battles

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personal views about public policy . . . to guide their decisions, usually with the suggestion that adherents . . . are willing to ignore precedent.” BLACK’S LAW DICTIONARY 850 (7th ed. 1999). Of course, judicial activism can work both a conservative and liberal bias, whether the subject is abortion rights or child visitation. See Thomas L. Jipping, *If Judicial Activism Is the Means, the End Is Not Justified*, (June 19, 2000), at <http://www.enterstageright.com/archive/articles/0600judicialactivism.htm>; see also LEAGUE OF WOMEN VOTERS OF MINNESOTA, CHOOSING MINNESOTA’S JUDGES: AN EXAMINATION OF THE PRESENT SYSTEM AND ALTERNATIVE PROPOSALS 11 (1998) [hereinafter “LEAGUE”] (“If judges are perceived to be ideological activists who make policy, rather than independent and dispassionate appliers of the law, then it follows that judges should not be insulated from politics, but that they should be publicly accountable for their rulings.”).

120. *Kelly*, 247 F.3d at 865.

121. William E. Hulbary & Thomas G. Walker, *The Supreme Court Selection Process: Presidential Motivations and Judicial Performance*, 33 W. POL. Q. 185, 189 (1980). In an examination of presidential motivations in judicial selection, William Hulbary and Thomas Walker concluded that approximately 93 percent of the eighty-four Supreme Court justices studied “reached the Court in part because the Chief Executive desired a nominee of a particular philosophical bent.”

122. BOUTROS, *supra* note 43, at 40.

123. JOHN MASSARO, SUPREMELY POLITICAL 159 (1990). In what amounts to an undeniable truth, WASHINGTON POST columnist David Broder wrote, concerning the Bork nomination, “[i]t should offend no one that the battle has this intensely political coloration. The pope’s visit reminds us that even those who have a higher

be fought so that in the end each side is content with the fact that a completely neutral federal judge has been chosen? Of course not. Each side's goal is to select a judge who, though fair and impartial, has an underlying value system that more or less represents that side's views and will be used to interpret existing laws.

Maybe the state's interest is only in the perception of independence from the public's point of view, regardless of an individual judge's true posture? But not being able to express one's views does not imply those views don't exist. "You have not converted a man because you have silenced him."<sup>124</sup> Judges and judicial candidates aren't nonpartisan simply because they can't talk politics, but that is not always seen as the case.<sup>125</sup> Akin to the "Guns Don't Kill People, People Kill People" mantra, words don't make a partisan judge, a partisan judge makes a partisan judge. The bottom line is that a false appearance with no underlying truth can only harm the judiciary and the voters.

In reality, it appears the majority opinion concurred with both ideas. Quoting *Letter Carriers*, "it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it."<sup>126</sup> Additionally, "[t]he state's interest in ensuring that judges *be and appear to be* neither antagonistic nor beholden to any interest, party, or person is entitled to the greatest respect."<sup>127</sup>

But as discussed, given human nature, the idea of a sterile

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calling are chosen through a political mechanism." *Id.* at 168 (citing David Broder, WASH. POST, Sept. 13, 1987, at D7). Further, Terri Jennings Peretti, Professor of Political Science at Santa Clara University, argues in her book, *IN DEFENSE OF A POLITICAL COURT*, that

[p]olicy motivation, particularly in the form of value-voting serves as the primary vehicle by which the [Supreme] Court performs an important representation function. Representation occurs when the justices decide in accordance with their political views, which have been consciously and deliberately sanctioned by elected officials competing for political control of the Court through the selection process. Rather than acting arbitrarily, the justices are merely carrying out the "policy premises" of their appointments.

TERRI JENNINGS PERETTI, *IN DEFENSE OF A POLITICAL COURT* 84 (1999).

124. JOHN MORLEY, *ON COMPROMISE* ch. 5 (1874).

125. For example, one writer remarks, "While there is no reason unnecessarily to stifle interesting discussion in the context of judicial elections, the law must not allow speech that compromises the impartiality of the candidate." Neil K. Sethi, *The Elusive Middle Ground: A Proposed Constitutional Speech Restriction for Judicial Selection*, 145 U. PA. L. REV. 711, 728 (1997).

126. *Kelly*, 247 F.3d at 867.

127. *Id.* at 865 (emphasis added).

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judicial world is impossible. To be completely nonpolitical is to be without thought and devoid of values. The fallacy of the current system is that voters are not clamoring for “don’t ask, don’t tell” treatment from their judiciary or the State. The choice by the people to hold judicial elections, even nonpartisan ones, is the same choice to bring to the table candidates of varying viewpoints. And yes, some of those viewpoints may be political. “Where the people are to rule through elections, such elections must respect the power of the people, not fear of popular incompetence or special interests.”<sup>128</sup> It is and can never be bad to know what the person you vote for *might* do in any given situation, because it provides *direct accountability to the voter*. Why have an election absent this accountability?

The dissent captured this sentiment in its view of what the people of Minnesota historically adopted as their policy on the judiciary. In *Moon v. Halverson*,<sup>129</sup> a Minnesota case from 1939, the issue surrounded 1912 election law legislation that placed, among other candidates, all supreme court justice and elective county officer names on a nonpartisan ballot.<sup>130</sup> The statute further disallowed party designations on the ballot and no candidate filing for nomination on the ballot could state his party affiliation, a move to increase the selection of judges based on merit.<sup>131</sup> Halverson allegedly let it be known in public he was basically a Farmer-Labor candidate.<sup>132</sup> The *Moon* court stated that two constructions of the statute were available; either a candidate could not state his party affiliation at any time throughout the election process, or the statute merely referenced filing for nomination and

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128. Brief of Amicus Curiae, The Minnesota Civil Liberties Union at 4-5, *Republican Party of Minnesota v. Kelly*, 247 F.3d 854 (8th Cir. 2001) (No. 99-4021) [hereinafter “MCLU Brief”]. Further,

[s]ince then, Minnesota voters have had the opportunity several times to adopt the “conservative,” “holding back waves of popular excitement” Hamiltonian approach to judicial selection. Minnesota voters have not chosen to make the change and adopt the federal system. They have left the people with an important voice in the selection of judges.

*Id.* at 10.

129. *Moon v. Halverson*, 206 Minn. 331, 288 N.W. 579 (1939).

130. *Id.* at 580.

131. *Id.*

132. *Id.* In 1944, the Minnesota Farmer-Labor Party merged with the Minnesota Democratic Party to form the present DFL. Historical information about the Farmer-Labor Party, *available at* <http://www.encyclopedia.com/articlesnew/04374.html>.

ballot content.<sup>133</sup> “We think the latter more practical and reasonable in light of our elective system of government.”<sup>134</sup> Further, “[t]he statute does not prohibit party activity or endorsements.”<sup>135</sup> Clearly, the court could have made the case for an extension of this limitation to further political activity as a reasonable interpretation of the statute. Noteworthy is not only the *Moon* court’s inferred reaffirmation of the importance of information to the electorate and the ability of a candidate to allow political information to reach the voters, but the fact that the court’s initial decision, as stated, was in truth a value judgment.

The dissent further emphasized the history of Minnesota policy towards its judiciary and if, in fact, independent judicial elections are within that policy interest. “Minnesota has repeatedly affirmed its citizens’ right to elect their judges, and has bolstered that franchise with laws enhancing merit-based elections and furthering the flow of information regarding the candidates to the electorate.”<sup>136</sup> It is this flow of information which allows citizens to elect judges based on their merits, which include not only “character, fitness, integrity, background (with the exception of their political affiliation), education, legal experience, work habits and abilities,” but other qualities as well, qualities that “piqued the interest” of Minnesota’s founders as well as those wishing to be *fully* informed about a candidate before sending him or her to the bench to interpret the law.<sup>137</sup> Indeed the dissent astutely read the context of an independent judiciary to take into account not merely the right of the candidate to inform, but the criticality of the people to be informed when selecting justices to serve. This entitlement of information to the citizenry is a sentiment that is not only inherent in the dissent’s opinion, but also, as discussed, was vital to the majority opinion in its decision to apply strict scrutiny as the standard of review.

The idea is this: An independent judiciary means judges who are “elected by well-informed, independent voters.”<sup>138</sup> In effect, any policy that stifles the free flow of information undermines the

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133. *Moon*, 206 Minn. at 333, 288 N.W. at 581.

134. *Id.*

135. *Id.* It is also interesting and insightful that the *Moon* court in this instance regarded emphasis on the candidate’s merits “irrespective of his party membership or association” as a “Utopia.” *Id.* at 580.

136. *Kelly*, 247 F.3d at 890.

137. *Id.*

138. *Id.* at n.30.

judicial selection process.<sup>139</sup> Where this will come into play may not necessarily be with Minnesota's interest in having an independent judiciary, which may indeed be compelling, but with the scope of what Minnesota has done with this decision. To have an independent judiciary, the voters need to be fully informed so, rather than electing partisan judges that they don't know are partisan, they can elect independent candidates. The decision becomes a two way street. Is it more important to keep information from voters about a candidate's views on disputed legal or political issues in order to minimize the chance that a partisan judge will be elected based on a populist appeal? Or is it just as important that voters know about a candidate's views on these issues so that a partisan judge is *not* elected? The whole concept of an election is voter choice, and voter choice equates with voter information. The State of Minnesota has already chosen to give its citizens decision-making power and has accepted the risk that "the people may be swayed one way or another by appeals and artifices of political campaigning."<sup>140</sup>

Indeed, the dissent pointed out from *Eu v. San Francisco County Democratic Central Committee*<sup>141</sup> that "[a] State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism."<sup>142</sup> While the facts of *Eu* involved legislative positions, the fundamental truth of that proclamation holds for any process where the people make an elective choice.

Another area of dispute in this case was that of judicial political pressure. "[A] State has an interest in protecting its judges from pressure to participate in partisan activities . . . ."<sup>143</sup> In the present case it certainly cannot be that the State is concerned that any judge would truly be beholden to the values or platform of a political party. If that were true, the public would be putting a much higher demand on its judiciary than on its elected legislative officials, from which expectations in this regard have not traditionally been high. It is not shocking that elected officials have and will continue to break campaign promises, only to be

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139. *Id.*

140. MCLU Brief, *supra* note 128, at 11.

141. *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 214 (1989).

142. *Id.* at 228.

143. *Kelly*, 247 F.3d at 867.



reelected again. But more importantly in the context of judicial candidates, could it be reasonably perceived that announcing one's views on disputed legal or political issues is akin to a campaign promise? If Minnesota's goal is to keep the judiciary independent from political influences in the sense that, even if an individual judge leans toward one political philosophy more than another, the State wants that judge to be able to "cross over" without feeling any political ramifications, the importance of the electorate to know from what side the judge leans is still too important to keep hidden from the people.

The majority opinion continued to pursue the idea that judges will bind themselves to particular positions and decide cases in a particular manner solely because the judge has announced his or her view. "The judicial candidate simply does not have a First Amendment right to promise to abuse his office."<sup>144</sup> As the dissent stressed, this proves too much, and not only because the Supreme Court has said, "the State may ban such illegal agreements [to engage in illegal conduct] without trenching on any right of association protected by the First Amendment," and that "[t]he fact such an agreement takes the form of words does not confer upon it . . . the constitutional immunities that the First Amendment extends to speech."<sup>145</sup> The majority opinion seemed to convey the feeling with those "abuse" words that the announce clause of Canon 5 is the only thing standing between judicial independence and substantial impropriety. But a judge has no further right to abuse his office just because he has leaped the election hurdle. Canon 2 of the Minnesota Code of Judicial Conduct is entitled *A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge's Activities*, within which Canon 2(B) states, "A judge shall not allow family, social, *political* or *other relationships* to influence judicial conduct or judgment."<sup>146</sup> Moreover, Canon 3(A)(2) declares, "[the judge] shall be unswayed by partisan interests, public clamor or fear of criticism."<sup>147</sup> Of course, the legislature has also created and given the Minnesota Board on Judicial Standards the power to "censure or remove a judge for . . . conduct prejudicial to the administration of justice that brings the judicial

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144. *Id.* at 862.

145. *Brown v. Hartlage*, 456 U.S. 45, 55 (1982).

146. MINNESOTA CODE OF JUDICIAL CONDUCT Canon 2(B) (2000) (emphasis added).

147. MINNESOTA CODE OF JUDICIAL CONDUCT Canon 3(A)(2) (2000).

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office into disrepute.”<sup>148</sup>

Similarly, in its analysis of whether Canon 5 was “necessary,” the court confused the idea of announcing one’s views on disputed legal or political issues with making “particularized pledges and predetermined commitments that mark campaigns for legislative and executive office.”<sup>149</sup> That comparison is mere fallacy. The contention is that a candidate’s message will attract a certain number of voters for the wrong reasons. However, the flip side of this assertion is equally plausible, that a judicial candidate’s stance will not always curry positive favor with the voters. Ideally, voters vote for or against incumbents based on a careful study of their past decisions and for challengers based on their views of disputed legal or political issues, in the context of a judicial philosophy.<sup>150</sup> Certainly, a candidate’s views of the legal and political issues will turn off a substantial number of voters, and in all likelihood the net benefit will be zero to the candidate. The voters as a whole, however, will have taken a major victory in terms of candidate information.

The vast majority of voters are not looking for commitments, they are looking for views. In the case at bar, Mr. Wersal, at multiple Republican Party gatherings, said he favored “strict construction of the Constitution.”<sup>151</sup> Strict constructionism is “[t]he doctrinal view . . . holding that judges should interpret a document or statute . . . according to its literal terms, without looking to other sources to ascertain the meaning.”<sup>152</sup> A disputed legal issue? Of course. Moreover, a candidate who promotes the fact he or she is a strict constructionist does no more than advocate a position undoubtedly held by a fair number of practicing judges. Certainly a position Minnesota voters would like to know as they cast their ballots. In the case of strict constructionism, it would be impossible to prejudge a case because strict constructionism is a method of interpretation, not final adjudication. Have all strict

148. MINN. STAT. § 490.16 (2000).

149. *Kelly*, 247 F.3d at 877.

150. The majority opinion states, “We further believe the Minnesota Supreme Court would conclude that general discussions of case law or a candidate’s judicial philosophy do not fall within the scope of the announce clause.” *Kelly*, 247 F.3d at 882. The court says this, however, in the context of *Stretton* and the district court’s “issues that would likely come before them.” As Judge Posner points out in *Buckley*, what issue is likely not to come before the court? *Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224, 229 (7th Cir. 1993).

151. *Kelly*, 247 F.3d at 858.

152. BLACK’S LAW DICTIONARY 1434 (7th ed. 1999).

constructionists currently on the bench prejudged their cases? A well informed public can only be appreciative of the fact a judge will decide different cases with different facts based on a core set of values. That is exactly what the electorate is looking for.

The majority opinion looked at recent Minnesota cases for additional support during its “necessary” analysis. In *Peterson v. Stafford*,<sup>153</sup> the court stated that the judicial office “requires its holder studiously to avoid partisan politics, refrain from all discussions of public issues and restrict one’s membership and participation in organizations to those primarily of a professional nature.”<sup>154</sup> This too goes far beyond reasonable expectations. Just as announcing one’s views on disputed issues will not necessarily lead to abuse of power, announcing one’s views also does not lead to partisan loyalty to an entire platform. In fact, what does an “independent” voter proclaim of him- or herself? Not that he or she has no views on any issues, but that he or she is not necessarily loyal to the views of one party. If the concern is attendance at political gatherings, many registered party members likewise do not fall in step with their party on every issue.

Former Governor Arne Carlson, during the supreme court’s consideration and approval process of the amendments to Canon 5, said, “[f]or the public to read newspaper headlines that a political party has endorsed and will work to elect a particular candidate would greatly harm the public’s confidence in the independence of the judiciary.”<sup>155</sup> But isn’t there greater harm in the candidate in fact harboring partisan feelings of which the voter knows and can know nothing? If a particular partisan candidate wanted to deceptively “play” independent as an election strategy, he could hide behind Canon 5, citing it as the reason he “can’t answer that question.”

Further evidence of what is really a disrespect for the voter’s right to know can be found in *Gustafson v. Holm*,<sup>156</sup> a case the *Stretton* court cited and from which reasoning was borrowed and repeated in the present case. In *Gustafson*, the relevant issue was the use of the word “incumbent” on the ballot.<sup>157</sup>

Use of the word ‘incumbent’ following the candidate’s

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153. *Peterson v. Stafford*, 490 N.W.2d 418, 425 (1992).

154. *Id.* at 425.

155. *Kelly*, 247 F.3d at 870.

156. 232 Minn. 118, 44 N.W.2d 443 (1950).

157. *Id.* 232 Minn. at 126-127, 44 N.W.2d at 447.

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name simply informs the voter of the person who presently holds the position. In assisting voters to cast their votes intelligently for offices unfamiliar to the average voter, it is only a matter of fairness that he be advised who the present judge is. If he then believes that the judge should be retained, he has the opportunity of expressing his opinion by his vote. If he feels that the present judge should be replaced, he has a like opportunity of so indicating his opinion. The underlying purpose of the legislation is to identify the candidate so that the voter will know whom he is voting for.<sup>158</sup>

Two issues are notable here. First, evidently the voter is to feel (or be?) fully informed and encouraged to cast a vote, regardless of his or her knowledge of the candidate, solely on the candidate's incumbent status. Second, the label "incumbent" is apparently a satisfactory tag to identify a judicial candidate, but party affiliation must not enter the voter's thought process. How is it any better to vote straight "incumbent" rather than straight Republican when the stated purpose of the legislation requiring this is to inform the voter? Granted, in 1950 the Minnesota District Judges Association had adopted the American Bar Association's 1924 Canons of Judicial Ethics, but as discussed, the bar on political speech and announcing one's views was relatively low. At least voters have a "gut feeling" based on party affiliation; incumbent status by itself is empty of relevant information.

Throughout this analysis, the court relied heavily on and borrowed much reasoning from *Stretton*, in which the announce clause was challenged.<sup>159</sup> In *Stretton*, the plaintiff was a lawyer and candidate for the Court of Common Pleas in Chester County, Pennsylvania, who brought suit contending the announce clause impeded his ability to campaign.<sup>160</sup> The announce clause was given a narrow construction and "limited to situations in which the candidate's speech pertains to matters that may come before the court for resolution,"<sup>161</sup> which narrowly tailored the provision to serve Pennsylvania's compelling interest in an impartial judiciary.<sup>162</sup> In *Buckley v. Illinois Judicial Inquiry Board*, a mid-court judge was

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158. *Id.*

159. *Stretton*, 944 F.2d at 139.

160. *Id.*

161. *Id.* at 143.

162. *Id.* at 144.

running for a seat on the Supreme Court of Illinois.<sup>163</sup> During his campaign, the judge circulated campaign literature stating he had “never written an opinion reversing a rape conviction.”<sup>164</sup> Two weeks from the election, the Judicial Inquiry Board filed charges against him.<sup>165</sup> Judge Posner, in his analysis of the announce clause, stated, “the only safe response to [the rule] is silence.”<sup>166</sup> Further, “when an overinclusive rule has the effect . . . of greatly curtailing an important part of the speech ‘market,’ the rule is deeply problematic.”<sup>167</sup> In response to the district judge’s narrowing of the rule to confine it to “issues likely to come before the judge in his judicial capacity,” Judge Posner said, “[t]here is almost no legal or political issue that is unlikely to come before a judge of an American court, state or federal, of general jurisdiction.”<sup>168</sup> More to the point, the broad construction of the announce clause has been found unconstitutional every single time it has been challenged. Even when narrowed, it has not passed muster.<sup>169</sup>

The compelling interest put forth by the majority is laudable and the independence of the judiciary is of extreme importance. But the stakes are higher when the subject is the heart of our democratic process: election speech and association. And this bar remains that high even though the subject is a judicial, not legislative or executive, candidate. Evidence of the cap on the judiciary’s independence from the First Amendment is given in the dissent’s citation to *Landmark Communications, Inc. v. Virginia*.<sup>170</sup>

Neither the Commonwealth’s interest in protecting the reputation of its judges, *nor its interest in maintaining the institutional integrity of its courts* is sufficient to justify the subsequent punishment of speech at issue here . . . . The remaining interest sought to be protected, *the institutional reputation of the courts, is entitled to no greater weight in the constitutional scales.*<sup>171</sup>

The dissent further pointed out that while the basis for sanctions

163. Buckley v. Illinois Judicial Inquiry Bd., 997 F.2d 224, 225 (7th Cir. 1993).

164. *Id.* at 226.

165. *Id.*

166. *Id.* at 228.

167. *Id.* at 229.

168. *Id.*

169. *Id.* at 231.

170. 435 U.S. 829 (1978).

171. *Kelly*, 247 F.3d at 898 (Beam, J. dissenting) (quoting *Landmark Communications*, 435 U.S. at 839, 841-42).

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may be different between *Landmark* and the case at bar, the severity of the Canon 5 restrictions to a judicial candidate “pose a much greater danger.”<sup>172</sup>

In terms of attendance at political gatherings, the inability of Minnesota judicial candidates to attend political gatherings is in even starker contrast to most states that have public judicial elections.<sup>173</sup> The necessity of a prohibition that as its purpose is to curtail a look of impropriety suffers from the same fundamental problem as the announce clause. That is, attendance at an event certainly does not guarantee or even predict that a candidate will blindly follow the tenets of that party, something brought up by the dissent.<sup>174</sup> But more importantly, if the goal is to disallow all attendance at truly “political gatherings,” the provision allows attendance at gatherings that can be far more political than Republican or Democrat.<sup>175</sup> One of the most important points the dissent made about this is that while varied ideas abound at both Republican and Democratic functions because of the “big-tent” nature of those parties, single issue organizations have obviously a small focus that may be counted on by that organization’s members to be upheld by the candidate should he or she get elected.<sup>176</sup>

Further, since a candidate is running for election, he or she needs votes. Attendance, not necessarily even speech, at a political party gathering is just another way to get in touch with more voters. “Candidates speak at political gatherings about their work experience, family life, community activities, family history and other facts about their lives which indicate what kind of person they are.”<sup>177</sup> A particular example is that of former judicial candidate Bruce A. Peterson, who spoke to the Republican Party of Minnesota

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172. *Kelly*, 247 F.3d at 898 n.40.

173. *See generally, supra* note 67.

174. *Kelly*, 247 F.3d at 900 (Beam, J. dissenting).

175. It is noteworthy that the actual language used in Canon 5(A)(1)(d) is “shall not . . . attend political gatherings” while the language regarding holding office in, identifying oneself as a member of, making speeches on behalf of and other clauses of Canon 5 refer to “political organizations.” It is the term “political organization” of Canon 5(D) that is defined as a political party organization. MINNESOTA CODE OF JUDICIAL CONDUCT Canon 5 (2000). Therefore, it is possible that the term “political gathering” of Canon 5(A)(1)(d) could be construed as any gathering with a political message. However, that is not the convention used in this case, and in fact, the dissent refers to Canon 5(A)(1)(d) as attending “political organization gatherings.” *Kelly*, 247 F.3d at 900 (Beam, J. dissenting).

176. *Kelly*, 247 F.3d at 901 (Beam, J. dissenting).

177. Appellant’s Brief at 20, *Republican Party of Minnesota v. Kelly*, 247 F.3d 854 (8th Cir. 2001) No. 99-4021.

during the 1996 campaign, saying

[d]uring the campaign . . . I spoke at an equal number of Republican and DFL gatherings . . . . These meetings were some of the high points of the campaign. The audiences were knowledgeable and interested, . . . the people present seemed likely to share their opinions with their friends and neighbors. *I never mentioned my party affiliation, nor did I ask for an endorsement.*<sup>178</sup>

Consequently, attendance at a smaller single focus group with proportionately fewer potential voters might suggest that particular candidate may be more in tune with that single issue. However, consistency demands that even attendance at a minor single-issue political gathering does not mean that a candidate conforms to those views.

The right to associate is “a right to join with others to pursue goals independently protected by the First Amendment.”<sup>179</sup>

There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of ‘orderly group activity’ protected by the First and Fourteenth Amendments . . . . The right to associate with the political party of one’s choice is an integral part of this basic constitutional freedom.<sup>180</sup>

The danger here lies in the implied connection between the candidate and the “advancement of political beliefs,” presumably those of the candidate. However, again, even though the right exists because the pursuit is protected, that does not mean that all individuals joined adhere fully to all beliefs of that organization.

The thrust of Equal Protection is that similarly situated people must be treated similarly. The majority opinion accurately stated that “[t]o conclude that the same restraints [of Canon 5] violate the Equal Protection Clause, we would have to determine that Canon 5 burdens the rights of political party members more than others and that ‘such differential treatment is not justified.’”<sup>181</sup> To explore this, it is necessary to determine what rights other organizations would have that political parties lose because Canon 5 forbids candidates to attend their political gatherings. Simply

178. *Id.* (emphasis added).

179. LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1013 (2nd ed. 1988).

180. *Elrod v. Burns*, 427 U.S. 347, 357 (1976).

181. *Kelly*, 247 F.3d at 875 (quoting *California Med. Ass’n v. Federal Election Comm’n*, 453 U.S. 182, 200 (1981)).

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put, it centers on the right of the political organization to express itself as it chooses.<sup>182</sup> The majority opinion cited *Broadrick v. Oklahoma*, a case involving a restriction on partisan activities by government employees, as stating that legislatures must have some flexibility in determining which employment positions require restrictions on political activity and which do not.<sup>183</sup> This footnoted citation within *Broadrick* referenced another case, *McGowan v. Maryland*<sup>184</sup> as clearly supporting the proposition. However, *McGowan* was a case involving the sale of merchandise on Sunday, a violation of Maryland statute, but more significantly it was an economic regulation, in which a rational basis standard of review, not strict scrutiny, was involved. The court in the case at bar did not independently address the burdening of the rights of political party members in this regard.

Further, such differential treatment is not justified. The majority opinion, regarding political parties, stated, “[t]hose parties are simply in a better position than other organizations to hold a candidate in thrall. Moreover, because political parties have comprehensive platforms, obligation to a party has a great likelihood of compromising a judge’s independence on a wide array of issues.”<sup>185</sup> This is simply not true. As alluded to above, the extensive scope of issues any political party holds as their own is the very thing decreasing the likelihood that a judge will be beholden to an entire party. There are simply too many variations within the members of any one political party. “A candidate’s appearance at a party function hardly indicates endorsement of its views. A speech at a party function supports nothing beyond the candidate’s own words, and an endorsement suggests only that the endorser finds a candidate more palatable than any other presently available.”<sup>186</sup> The majority goes on to declare that Canon 4 imposes broad requirements that judges are to avoid involvement with associations (other than political parties) to avoid casting doubt on their impartiality.<sup>187</sup> But the Canons as a whole impose those requirements on all judicial activities. In other words, anything the Canons impose on a judge regarding associations in general could

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182. *Id.* at 895 (Beam, J. dissenting).

183. *Id.* at 875 (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 607 n. 5 (1973)).

184. 366 U.S. 420 (1961).

185. *Kelly*, 247 F.3d at 876.

186. *Id.* at 901 (Beam, J. dissenting).

187. *Id.* at 876.



be applied to his or her association with political parties as well, rendering unnecessary a distinct restriction concerning political parties.

The dissent's opinion regarding single-issue organizations was again on point. As discussed, the risk that organizations that have a central issue focus will hold a candidate's feet to the fire is far greater than if the organization is one of broad expanse. As the dissent illustrated, these smaller groups are not necessarily distinct from the political or legal process.<sup>188</sup> "This country is also seeing a marked increase in special interest politics, which brings out highly organized groups who are motivated to defeat or elect a judge according to his or her position (presumed known) on single issues such as abortion, term limits, the death penalty, or guns."<sup>189</sup> The majority comments that this dissenting argument is in fact a call for more, rather than less, restriction.<sup>190</sup> But the obviousness of this problem on both ends suggests that the supreme court is not addressing the core of the problem. "By removing the only organizations that endorse candidates across a spectrum of issues, voters are left with only the shrill voice of narrow advocacy coming from special interest groups."<sup>191</sup>

Admittedly, if the goal is to eliminate the appearance of judicial bias, from a narrowly tailored/necessary point of view, the underinclusive nature of the prohibition on attendance at political gatherings is likely not a constitutional problem and in fact underinclusiveness is rarely invalidated by the court.<sup>192</sup> However, the compelling interest of the State must take a backseat to the fundamental rights that interest is curtailing. The judicial candidate's right of expression cannot be trumped solely because one of the three branches of government is deemed by the State to be "more equal" than the other two. "In . . . inviting a candidate to speak, a party 'reflects its members' views about the philosophical and governmental matters that bind them together [and] seeks to

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188. *Id.* at 901 (Beam, J. dissenting). The dissenting opinion mentions groups active in recent judicial elections: The League of Women Voters, People for Responsible Government, Minnesota Women Lawyers, and Lavender Magazine, among others. *Id.*

189. LEAGUE, *supra* note 119, at 10. ("These groups, whose interests are clearly focused, increasingly are targeting judicial campaigns as a relatively inexpensive way to influence public policy."). *Id.*

190. *Id.* at 872 n.17.

191. *Kelly*, 247 F.3d at 902 (Beam, J. dissenting).

192. *TRIBE*, *supra* note 179, at 1440 n.4.

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convince others to join those members in a practical democratic task,' an election."<sup>193</sup> The entire election process and all its players benefit by the free flow of information; candidates, parties, and voters.

Much has been written about the judicial selection system, both locally and nationally. The term "incumbent protection" has been thrown about, reflecting the apparent advantage incumbents have to reelection.<sup>194</sup> For example, in the 2000 Minnesota General Election, all ten of the incumbent judges up for reelection won.<sup>195</sup> Reasons given for this advantage include lawyers who don't want to run against sitting judges before whom they may be practicing and the listing of "incumbent" on ballots.<sup>196</sup> Of course, the issue in the case at bar has some bearing as well.<sup>197</sup>

The election system itself has come under question, in the form of the virtue of nonpartisan versus partisan elections. "[B]ecause the party voting cue is not available in nonpartisan elections, even more voters are relegated to basing their vote on irrelevant factors, such as ballot position and name. Because of these factors, incumbents overwhelmingly win re-election, regardless of ability."<sup>198</sup> Some suggestions for improving the system include an active role for the media to inform voters.<sup>199</sup> But in at least one large metro area of Minnesota, this will not likely result in an impartial, objective source of information for voters who indulge in print media.<sup>200</sup> While there is nothing wrong with the

193. *Kelly*, 247 F.3d at 893 (Beam, J. dissenting) (quoting Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n, 518 U.S. 604, 615 (1996)).

194. LEAGUE, *supra* note 119, at 10.

195. Office of the Minnesota Secretary of State, 2000 – Minnesota General Election, Judicial Results (2000), at [http://elections.sos.state.mn.us/ENR2000\\_General/ElecRslts.asp?M=J&P=A](http://elections.sos.state.mn.us/ENR2000_General/ElecRslts.asp?M=J&P=A) (last modified Dec. 12, 2000).

196. LEAGUE, *supra* note 119, at 10.

197. "With challengers unable to create traction by discussing actual issues . . . the results in judicial elections are hardly surprising." *Kelly*, 247 F.3d at 896 (Beam, J. dissenting).

198. Peter D. Webster, *Selection and Retention of Judges: Is There One 'Best' Method?*, 23 FLA. ST. U. L. REV. 1, 26 (1995).

199. LEAGUE, *supra* note 119, at 18-19.

200. For example, a review of the editorial endorsements of the *Minneapolis Star Tribune* from election years 1988 through 2000 reveals the tilt these endorsements have taken. The following results are listed in order of Democrat, Republican, and Independent (if present) candidate percentages taken as a whole from that 12 year time period: U.S. President, 100-0; U.S. House, 73-25-2; U.S. Senate, 75-25; Governor, 33-67; Minnesota Legislature, 70-29-1. The results are on file with author. The extremely partisan commentary within these endorsements

editors of a newspaper supporting a philosophy on their editorial page, the electorate must be aware of that philosophy when attempting to acquire information through those very editorials.

The lesson indeed may be that politics, at its base merely a marketplace of ideas, is inherent in everything around us, from an independent judiciary, to a news source attempting to educate us on that judiciary. But just as the reader must know from what context he is reading, the voter must know for what principles he or she is voting.

#### V. CONCLUSION

Regardless of the current debate over Minnesota's choice of judicial selection, Minnesota's founders chose a system whereby the citizens elect their judges. To vote effectively, the people must be allowed to examine factors they feel are critical to determining judicial ability. Factors that may be above and beyond what the Minnesota Supreme Court thinks are necessary or important. By allowing Canon 5 to extinguish these rights, the Eighth Circuit's inconsistent decision only serves to cement the status of incumbent judges, weaken their challengers, and thwart the ability of the citizens to place within the judiciary people who share their values.

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is typified with remarks such as those against the Republican challenger of Kathleen Sekhon, the *Star Tribune's* endorsee. "Those ideas – cutting taxes, restricting abortion, relaxing laws against carrying concealed weapons – won't contribute much to bettering life in Minnesota." Editorial, MPLS. STAR TRIB., Oct. 27, 1998, at A13.